

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WESTRIDGE TOWNHOMES OWNERS ASSOCIATION,

Case No. C16-1011RSM

Plaintiff,

ORDER DENYING MOTION FOR
PARTIAL SUMMARY JUDGMENT

V.

GREAT AMERICAN ASSURANCE
COMPANY, a foreign insurance company, as
successor to AGRICULTURAL
INSURANCE COMPANY; GREENWICH
INSURANCE COMPANY, a foreign
insurance company,

Defendants.

This matter comes before the Court on Plaintiff Westridge Townhomes Owners Association (“the Association”)’s Motion for Partial Summary Judgment. Dkt. #64. Defendants Great American Assurance Company and Greenwich Insurance Company oppose the Motion, arguing in part that the Court should reserve ruling on these issues. Dkt #72 at 3.

The Association’s Motion asks the Court to determine “[w]hether Defendants have the burden of proof regarding ‘fortuity’ or, in the alternative, whether the Court should certify the issue to the Washington Supreme Court.” Dkt. #64 at 3. The Association argues that “courts

1 applying Washington law have repeatedly assigned the insurer the burden of proof regarding
2 the issue of whether the insured knew its loss would occur, *i.e.*, proof of a lack of fortuity..."

3 *Id.* at 4.

4 Defendants raise a procedural issue with this Motion, arguing that:

5 A summary judgment motion must be addressed to the "claim or
6 defense—or the part of each claim or defense—on which summary
7 judgment is sought." Fed. R. Civ. P. 56(a). Here, the Association
8 does not seek a judgment on fortuity as a claim or defense or as to
9 some element of a claim or defense. Rather, the Association seeks
10 a ruling on the general legal question of the burden of proof at trial
11 on a claim or defense. It might be proper to address this question as
12 a part of a motion for summary judgment if it could be argued that
13 one or the other party had the burden of proof and could not come
14 forward with any evidence on the issue, but the Association does
15 not claim that such a factual situation exists.

16 Unless the Association can show that a favorable ruling on the
17 burden of proof would lead to full or partial judgment as a matter
18 of law in its favor, then the proper place to raise its argument is
19 when parties argue over the wording of instructions to the jury.
20 Reserving ruling until that point would avoid unnecessary rulings
21 on general questions of state law and would also give the Court the
22 benefit of the full context of the case in which to make its ruling.

23 Dkt. #72 at 3.

24 In Reply, the Association argues that, under Rule 56, there is no question that a party
25 may move for a ruling on part of a defense. Dkt. #74 at 9 (citing *Hanson v. Safeco Ins. Co. of
Am.*, C13-1151JLR, 2014 WL 3752114, at *4 (W.D. Wash. July 30, 2014)). The Association
26 argues that "[p]art of resolving Defendants' fortuity affirmative defense is assigning the burden
27 of proof," and that "the proper allocation of the burden of proof presents a purely legal issue
28 conducive to summary judgment." *Id.*

29 The Court agrees with Defendants that this Motion is premature. The Association is
30 requesting the Court to line up, in advance, a favorable portion of a hypothetical ruling on an

1 affirmative defense. The Association's Reply brief does little to respond to Defendants'
2 procedural concerns, and appears to imply that, while the burden of proof is a "purely legal
3 issue," there could be a factual dispute about this affirmative defense. If so, Defendants are
4 correct that the proper place to raise such a legal argument would be when parties argue over
5 the wording of instructions to the jury. If this is not the case, then this issue should be raised in
6 a forthcoming dispositive motion seeking to dismiss this affirmative defense.
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8 The Court is also concerned by the Association's apparent legal strategy of filing serial
9 partial summary judgment motions. *See* Dkt. #50 (an earlier Motion for Partial Summary
10 Judgment filed by the Association). Under the Court's Local Rules, "[a]bsent leave of the
11 court, a party must not file contemporaneous dispositive motions, each one directed toward a
12 discrete issue or claim." LCR 7(e)(3). Although the Association's two Motions are not
13 contemporaneous, they have been filed before the close of discovery, when the facts would be
14 in place for a single summary judgment motion to be filed containing all of the legal issues that
15 the Association believes need to be resolved by the Court. In any event, the Court does not
16 grant leave for the Association to file contemporaneous dispositive motions.
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19 The Association requests in the alternative that the Court certify this question to the
20 Washington State Supreme Court. "The decision to certify a question to a state supreme court
21 rests in the sound discretion of the district court." *Eckard Brandes, Inc. v. Riley*, 338 F.3d
22 1082, 1087 (9th Cir. 2003). Certification is appropriate only "[w]hen in the opinion of any
23 federal court before whom a proceeding is pending, it is necessary to ascertain the local law of
24 this state in order to dispose of such proceeding..." *Peterson v. Graoch Associates No. 111*
25 *Ltd. P'ship*, 2012 WL 254264, at *2 (W.D. Wash. Jan. 26, 2012) (emphasis omitted); *see also*
26 RCW 2.60.020.
27
28

Certification is unnecessary here, partly because the Association premises its Motion on the assertion that Washington law is clear on this issue. *See* Dkt. #65 at 6 (“the Washington Supreme Court has plainly stated that the ‘fortuity’ principle exists under Washington law solely as the ‘known risk’ defense, which is an issue on which the insurance company bears the burden of proof.”). More significantly, certification is inappropriate at this time because it is not “necessary” in order to “dispose of such proceeding” for the reasons identified above. *See Peterson, supra.*

Having reviewed the relevant briefing and the remainder of the record, the Court hereby finds and ORDERS that the Association's Motion for Partial Summary Judgment, Dkt. #64, is DENIED.

DATED this 11 day of December, 2017.



RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE